IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

175

No. [redacted]

MONTREAL SECURITIES, INC., *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Carl L. Shipley and Thomas A. Ziebarth, on behalf of Montreal Securities, Inc., a corporation, pray that a writ of certiorari issue to review the decision of the United States Court of Claims in this case.

OPINION BELOW

The opinion of the United States Court of Claims is reported at 329 F. 2d 956, and is set out *infra* in the appendix, page 1a.

JURISDICTION

Jurisdiction of the Supreme Court of the United States is invoked pursuant to Title 28, U. S. Code, Section 1255.

QUESTION PRESENTED

Whether a purchaser, upon rescission of a contract for the sale of an apartment project owned by the Federal Housing Administration on the ground of mutual mistake of fact and law, is entitled to a refund of the purchase monies paid as a result of such mistake.

STATUTES INVOLVED

Title II of the National Housing Act, Section 207(c)(2), 12 USC § 1713(c)(3), provides in pertinent part:

> "No mortgage shall be accepted for insurance under this section or section 210 unless the Commissioner finds that the property or project, with respect to which the mortgage is executed, is economically sound."

Section 207(1) of the same Title, 12 USC § 1713(1), provides in pertinent part:

> "Notwithstanding any other provision of law relating to the acquisition, handling, or disposal of real or other property by the United States, the Commissioner shall also have the power . . . to . . : sell for cash or credit or lease in his discretion, any property acquired by him under this section."

Section 207(c)(2) of the same Title, 12 USC § 1713(c)(2), provides in pertinent part:

> "To be eligible for insurance under this section a mortgage on any property or project shall involve a principal obligation in an amount . . . . not to exceed 90 per centum of the estimated value of the property or project."

Title IX of the National Housing Act, Section 903(c), 65 Stat. 297; 12 USC § 1750 b (c), provides in pertinent part:

> "... no mortgage shall be accepted for insurance under this subchapter unless the Commissioner finds that the project with respect to which the mortgage is executed is an acceptable risk in view of the needs of national defense."

Section 904(f) of the same Title, 65 Stat. 300; 12 USC § 1750 c (f), provides in pertinent part:

> "Notwithstanding any other provision of law relating to the acquisition, handling, or disposal of real property by the United States, the Commissioner shall have the power to . . . sell for cash or credit, in his discretion, any properties conveyed to him in exchange for debentures and certificates of claim as is provided in this section? . . ."

STATEMENT

In April 1961, the Federal Housing Administration issued a "Prospectus and Invitation to Bid" on two apartment projects located in Williston, North Dakota, known collectively as the Manor Apartments. These properties were originally insured by the FHA under Title IX of the National Housing Act, 65 Stat. 295-302 (1951), as amended, 12 USC Sec. 1750 *et seq.* The FHA subsequently became the owner of the projects through foreclosure.

The "Prospectus and Invitation to Bid" contained a general description of the properties, the minimum acceptable price, ($165,000), the maximum mortgage it would take ($150,000), and the cash deposit required with the bid ($10,000). Also set forth were the rents fixed by the FHA and the percentage of occupancy of each of the apartments for the 12 month period beginning in March 1960 and ending in February 1961. Williston Manor, with 54 rental units, and Northwestern Manor, with 12 rental units,

were represented as having the following percentages of occupancy.

Month	Williston Manor	Northwestern Manor
March 1960	80	—
April 1960	83	—
May 1960	80	92
June 1960	80	83
July 1960	86	92
August 1960	63	83
September 1960	83	83
October 1960	83	91
November 1960	80	100
December 1960	80	100
January 1961	83	92
February 1961	77	86

Petitioner's bid of $170,275 was accepted. A formal contract was entered into on May 8, 1961, which provided that petitioner was to pay $10,000 immediately and the balance of the purchase price ($10,275 in cash and a $150,000 note secured by a mortgage and chattel mortgage) at or prior to closing. The agreement also called for the petitioner (a New York corporation) to take title in the name of a North Dakota corporation to be set up for that purpose. On July 28, 1961, petitioner assigned the contract to Lincoln Apartments, Inc., its wholly-owned subsidiary. On October 25, 1961 the closing took place pursuant to the contract terms and title passed to Lincoln Apartments, Inc., which, in turn, gave the FHA its note secured by a mortgage and chattel mortgage.

Shortly thereafter, occupancy of the two apartments declined to only 25% of capacity. Petitioner was unable to meet even the mortgage payments out of the rental income and on May 21, 1962 it notified the FHA that it rescinded the contract and requested the return of the $20,275 which it had previously paid. On June 20, 1962 the FHA refused to accept the rescission or to return the money.

Petitioner sued in the United States Court of Claims on July 18, 1962 for a return of the purchase price, and in a decision dated March 13, 1964 (Appendix A, *infra*) the Court granted the government's motion for summary judgment and dismissed the complaint.

REASONS FOR GRANTING THE WRIT

1. By its actions the Federal Housing Administration indicated that it believed that it was bound by the standard of "economic soundness" when it made representations in its "prospectus" as to the current rate of occupancy, the projected operating expenses, the minimum purchase price and the maximum loan which it would make on the property. Petitioner believed these representations and in reliance upon its understanding of the Commissioner's duty made a good faith bid. When, as it turned out, that the minimum purchase price and mortgage were palpably *unsound* economically the Commissioner erred in refusing to allow rescission and a refund of the purchase money paid. Based on the information furnished by the FHA, the Manor Apartments presented a reasonably attractive investment opportunity. Quite obviously the Commissioner thought so too and he set the minimum price and maximum mortgage accordingly.

While the law, 12 USC § 1713(d) and § 1750c(f), allows the Commissioner "in his discretion" to sell property which he acquires, this discretion is not unlimited. If he were to sell for an unconscionably low price the courts would undoubtedly set aside the sale as being an abuse of the Commissioner's discretion. The Government should not be unjustly enriched simply because the Commissioner, under the guise of an exercise of his discretion, is able to induce the sale of a housing project by offering credit terms which are economically unsound.

Such indifference on the part of the Commissioner amounts to a lack of good faith, and, as the Court of Claims

pointed out by way of *dicta* in *Alloys & Chemicals Corp. v. U. S.*, 1963, 324 F. 2d 509.

> "This is not to say that allegations short of a positive intent to deceive will never raise a material question of fact on defendant's good faith; for in appropriate circumstances a vendor's indifference to the accuracy of his estimate might conceivably be alleged which is so consummate as to be of identical effect."

2. The decision below is probably not in accord with the decision of this Court in *United States v. Utah, N. & C. Stage Co.*, (1905) 199 U.S. 414, 26 S. Ct. 69, 50 L. Ed. 251. In that case, the Stage company was awarded extra compensation for new and additional services which the Court found not to be within the contemplation of the parties at the time when a contract for the carriage of mails was entered into, despite a contractual agreement that the Postmaster General could order extra service without additional compensation. In the instant case, the abrupt decline in rate of occupancy was not within the contemplation of the parties. Just as the Court would not require a contractor to perform services which were not reasonably within the scope of a contract, it should set aside a contract for the sale of an apartment project, where, as here, the parties were mistaken as to the economic soundness of the project.

3. There is a probable conflict between the decision in the instant case and the decision in *Krupp v. Federal Housing Administration*, (CA-1, 1961) 285 F. 2d 833. In the latter case, the FHA, using the same type of "prospectus" as is here involved, misstated the number of carports which were available in the project. The same disclaimers and invitation to inspect were made a part of that document. Krupp actually *did* inspect. The court held, however, that an invitation to inspect a property will not protect the government in all cases particularly where the nature of the statement is clear.

This case presents an even stronger injustice, for in *Krupp, supra*, an inspection and measurement of the garage spaces would have revealed the patent error in the Government's "prospectus". Here, however, there were positive statements relating to percentage of occupancy, price and mortgage terms which, together, constituted an affirmative representation as to "economic soundness". No ordinary inspection could have revealed any error. Only a comprehensive economic survey of the rental housing market in the Williston, N. D. area could have raised any question as to the validity of the FHA's representations. Yet this is the very kind of expertisse with which the vendor agency is charged by law.

4. Broadly speaking, this case presents the question of whether the Commissioner of the Federal Housing Administration may seek refuge in the doctrine of *caveat emptor* in his dealings with the public when selling property which comes into the agency's possession through foreclosure or otherwise. The Court of Claims, in its decision treated this case as merely "another in the long series of suits by dissatisfied purchasers of Government property".

The responsibility of the Commissioner in disposing of such property is vastly different from that of the heads of other Government agencies selling surplus personal property on a "where is, as is" basis. The Commissioner is, by law, charged with the responsibility of implementing the various Acts of Congress which are designed to promote the expanded availability of housing through the Government's guarantee of loans which are found by the Commissioner to be "economically sound" 12 USC 1713 (c)(3) or, as was the case in certain emergency legislation under which the project here involved was *originally* insured) loans which constituted "an acceptable risk in view of the needs of national defense" 12 USC 1750b(c).[1]

[1] This authority expired on August 1, 1954. 65 Stat. 295 (1951) as amended, 67 Stat. 125 (1953), 42 USC § 1591c.

In order to carry out its statutory duties, the FHA must keep abreast of all market conditions which might affect the value of residential housing, and for this reason, maintains insuring offices in principal cities throughout the country. Thus, the FHA is in a vastly superior position to make a determination of "economic soundness".

According to the "Prospectus and Invitation to Bid" involved in this case the Manor Apartments were constructed in 1954 and 1955 and originally the gross rentals (based on 100% occupancy) totaled $54,144.00. At the time the project was offered for sale by the FHA the rents had been reduced and the then current rental rate (based on 100% occupancy) was said to total $46,290.00. The actual rate of occupancy for the previous 10 or 12 months averaged about 80%. The project was originally insured under Title IX of the National Housing Act, 12 USC 1750b(c) but this Title expired since the emergency housing needs of the Korean War had ended.

Obviously, the reduction in rents reflected some diminution in housing needs in Williston, N. D. However, according to the "Prospectus" occupancy was fairly level at the 80% mark. The FHA indicated that the minimum bid which would be considered responsive was $165,000.00 and that the maximum mortgage was set at $150,000.00. This was clearly in line with the statutory admonition, 12 USC 1713(e)(2) that the principal obligation not exceed "90 per centum of the estimated value of the property or project."

The Commissioner has the authority "to sell for cash or credit . . . in his discretion any property" acquired by or conveyed to him whether under the National Housing Act, 12 USC § 1713(l) or under the Defense Housing Amendment 12 USC § 1750c(f). Petitioner respectfully submits that the Commissioner's exercise of this "discretion" requires that he use the same degree of responsibility in any representation relating to the valuation of property which

he proposes to sell as he would require of the promoters of a project seeking FHA insurance. The only standard in effect now or at the time bids were let is that of "economic soundness".

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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